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No. 198

In the Supreme Court of the United States

OCTOBER TERM, 1964

JOHN T. BOURN, PETITIONER

v.

CIVIL AERONAUTICS BOARD AND N. E. HALABY, ADMINISTRATOR, FEDERAL AVIATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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The underlying issue is whether the Civil Aeronautics Board erred, in an airman's license revocation proceeding, by admitting into the record petitioner's answers to a "Request for Admissions under Rule 36 of the Federal Rules of Civil Procedure." If so, subsidiary questions are: (a) whether petitioner's failure to raise the objection before the agency foreclosed judicial consideration of the matter and (b) whether, in any event, the admission was prejudicial error.

Petitioner is the holder of a commercial pilot and a flight instructor certificate. He owns and operates a helicopter which he uses for cropdusting and selling helicopter rides at public events such as State fairs. After an investigation conducted pursuant to Section 609 of the Federal Aviation Act, 49 U.S.C. 1429,[1] the Administrator of the Federal Aviation Agency found that petitioner had committed various violations of the Civil Air Regulations and ruled that safety in air transportation and the public interest required the revocation of petitioner's certificate.

Upon appeal, an evidentiary hearing was held before a Civil Aeronautics Board hearing examiner (Tr. 25-1288).[2] The examiner found that petitioner had violated various Civil Air Regulations by (1) flying his aircraft too low on four occasions over fairgrounds while a State fair was in progress, thereby endangering the lives and property of both his passengers and of persons attending the fair (Tr. 1439-

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[1] Under Section 609 of the Federal Aviation Act, the Administrator is empowered, after investigation, to issue an order suspending or revoking in whole or in part any airman's certificate. The airman so affected may appeal this action of the Administrator to the Board, where he is entitled to a hearing in which the Board is not bound by the Administrator's findings of fact, and the appeal stays the effectiveness of the Administrator's order (except in a situation not here relevant where the Administrator advises the Board that an emergency exists and that safety in air transportation requires the immediate effectiveness of his order). The Administrator's order also served as the Administrator's complaint to the Board in accordance with the Board's Rules of Practice (14 C.F.R. 301.14 (1960)).

[2] Transcript references are to the unprinted pages of the original record.

1443); (2) landing his aircraft on the picnic grounds in a State park while picnics were in progress so as to endanger the lives and property of the picnickers (Tr. 1443-1445); (3) flying his aircraft while it was in an unairworthy condition over a populated area of Los Angeles County, California (Tr. 1445-1447); (4) lifting off in his aircraft in an attempt to avoid payment of a repair bill with an employee of the repair station clinging to its frame (Tr. 1451-1453); and (5) failing to maintain proper entries in his logbooks of his flight time and the repairs made to his aircraft (Tr. 1445-1451).[3]

The examiner ruled that these violations and petitioner's overall past record demonstrated such a disregard for safety as to require revocation (Tr. 1401-1405). The Board, on appeal, upheld the examiner's findings of violation and ruled that safety in air commerce and the public interest required the revocation of petitioner's license (Tr. 1453). It further ruled that the need for revocation was also supported by the history of petitioner's past violations of the regulations, as evidenced by an earlier revocation of his license.[4] The court of appeals affirmed. It entered a judgment (Pet. App. A), but rendered no opinion.

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[3] This conduct violated Sections 60.17, 60.12, 43.20, and 43.23 of the Civil Air Regulations.

[4] The Board pointed out that the prior revocation, which occurred in 1958, was for eleven separate violations of the safety regulations by the petitioner involving the carriage of passengers or the conducting of cropdusting operations without a valid rating and the making of passes over a schoolhouse during school hours at less than the minimum prescribed altitudes of flight (Tr. 1451).

Prior to the hearing before the examiner, counsel for the Administrator served petitioner with a document entitled "Request for Admissions under Rule 36 of the Federal Rules of Civil Procedure", to which petitioner responded without objection.[5] These requests, together with petitioner's response, were admitted into the record by the examiner. Petitioner's complaint is that the examiner should not have allowed his answers into the record because, he says, they were obtained through the invocation of the Federal Rules and the use of these Rules by an administrative agency was improper. Petitioner, however, offered no objection to the Administrator's requests and freely supplied the requested information. His counsel did not object to their receipt in the record, although specifically asked by the hearing examiner whether he had any objection to their introduction (Tr. 32-33). For this reason alone he should not be heard to complain.[6] The issue is foreclosed from con-

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[5] Petitioner's response was made by writing his answers on the face of the request served on him (Tr. 1662-1668).

[6] The case law relied upon by petitioner, rather than supporting his contention that the action here was improper, fully sustains it. These cases hold that the technical rules of evidence dealing with the exclusion of evidence in judicial proceedings are not binding on administrative agencies, and that an agency's procedures in connection with evidentiary matters may be more, rather than less, flexible than those of the courts. *Federal Trade Comm'n* v. *Cement Institute*, 333 U.S. 683, 705-706; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 155; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229-230; *Interstate Commerce Comm'n* v. *Baird*, 194 U.S. 25, 44.

sideration for the additional reason that at no time was any objection urged before the administrative agency, nor has petitioner suggested "reasonable grounds for failure to do so." Federal Aviation Act, § 1006(e), 49 U.S.C. 1486(e); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453; *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 183 F. 2d 975 (C.A. D.C.); *Nebraska Department of Aeronautics, et al.* v. *Civil Aeronautics Board*, 298 F. 2d 286 (C.A. 8).

In any event, petitioner's case has not been prejudiced by the receipt of his admissions into the record, for the testimony he gave as a witness before the examiner was in substance the same as the information supplied in answering the "Request for Admissions".[7]

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[7] This was primarily to the effect that he was the owner and operator of the aircraft, that he piloted the aircraft at the time that various incidents occurred, and that he was ignorant of the speed-altitude limitations of his aircraft (Tr. 250-281; 315-402; 505-565; 1111-1119).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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